

The Mouse and the Snail: Reappraising the Significance of *Donoghue v Stevenson* Part II – The ‘Intellectual Superstructure’ of Scots Delict

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Matthew Chapman’s 2010 monograph on *Donoghue* purports to discuss the ‘roots of the neighbour principle’,¹ but does so wholly through the lens of the Common law. The law of Scotland itself is given no consideration. This is regrettable, since the history, background and ‘intellectual superstructure’ of the law of Scotland differs considerably from the position in the Common law world. As MacQueen and Sellar noted in the *History of Private Law in Scotland*, ‘unlike English law at the end of the Eighteenth century the Scots law of negligence appeared to be developing in conformity with a recognisably Civilian pattern’, with ‘a basis provided by the Roman text on liability for property damage, as developed in the mediaeval and early modern *ius commune* and by the natural lawyers to provide a compensatory remedy for any form of *damnum iniuria datum* (damage caused by wrongfulness)’. While ‘one-hundred years later, however, Scots law appeared to be closer to the English common law’,² this appearance is belied by the fact that the very word ‘negligence’ is not, and has never been, a term of art in Scotland, and by the fact that this jurisdictions has never been ‘burdened with the legacy of the forms of action’.³

In England, ‘negligence means two things: (i) a method of committing some (but certainly not all) torts; (ii) an independent tort which sprang from the action upon the case for negligence and which may be said to have developed into the nominate tort of negligence during the first quarter of the Nineteenth century’.⁴ In Scotland, however, the term ‘negligence’ can be understood only in the former sense, and even then provided only that one is careful to understand that the Scots system is not completely fragmented into nominate ‘delicticles’ with their own independent requirements for liability. Rather than relying on the concept of ‘duties of care’ to determine the boundaries of liability for negligent wrongdoing, ‘in the Nineteenth and early Twentieth centuries Scots law dealt with the “ripple” effect of wrongful conduct by distinguishing between harm which was sufficiently proximate or close to the wrong from harm which was too remote’.⁵ Hence, in the 1861 case of *Weems v Mathieson* (1861) 4 Macq 215 (HL), in which counsel for the defender attempted to argue the irrelevance of the claim on the basis that the pursuer neither ‘aver[ed] a duty nor an omission to perform it’, the court found

¹ Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson*, (Wildy, Simmonds and Hill, 2010), ch.5.

² Hector L. MacQueen and W. D. H. Sellar, “Negligence” in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations*, at 517-518.

³ Elspeth C. Reid, ‘Personality Rights: A Study in Difference’ in Vernon V. Palmer and Elspeth C. Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland*, (Edinburgh University Press, 2009), at 394.

⁴ Percy H. Winfield, *Duty in Tortious Negligence*, [1934] *Colom. L. R.* 51, at 51.

⁵ Brian Pillans, ‘Delictual Liability at Common Law’ in Joe Thomson (ed.), *Delict*, (W. Green, 2007), para.504.

that a delictual action was relevant ‘as long as negligence or *culpa* on the part of the defender was alleged, there being no need to aver a duty owed by the latter to the [pursuer]’.⁶

While, in the Common law world, ‘the distinction between tort and crime... was established relatively early’,⁷ the substantive Scots law of crime and delict could be readily identified with one another until the beginning of the Nineteenth century, and indeed ‘an important part of that framework [of the Scottish system]... was that there was no division between the conceptual structure of delict and crime’.⁸ This, naturally, has had consequences for the overall structure of both the law of crime and the law of delict today, since the ‘Institutional writers’ – authoritative jurists who laid the foundations of the Scottish legal system⁹ and who (somewhat ironically, as MacCormick points out)¹⁰ are habitually referred to as positive sources of authority in court even today – exclusively wrote their works at a time in which delict and crime were conterminous topics.¹¹ The rules and principles of criminal law are not now the same as those which govern the law of delict, but there remains a ‘general theme that common law crimes are delicts’.¹² Hence, to take one notable example, while the definition of ‘rape’ within criminal law was altered in 2009 by the Sexual Offences (Scotland) Act 2009, which was silent as to the meaning of that word within the context of civil law, it was accepted by the court and counsel in *DC v DG and DR* [2017] CSOH 5 that ‘the act of rape is an actionable civil wrong, and that, whether the act was to be viewed as criminal or delictual, no material distinction arose in respect of its constituent elements’ (at para.267 *per* Lord Armstrong).

The treatment of ‘rape’ by Lord Armstrong and counsel in *DC* is consistent with the institutional nature of the Scots law of delict. Rather than recognising a nominate delict, or ‘delicticle’, of ‘rape’ *per se*, the conduct which amounts to an actionable ‘rape’ in civil law can be identified with a wider *genus* of wrongdoing: that of *iniuria*. The term of *iniuria* appears in two distinct contexts in Scots law, as indeed it did in Roman law: paired in the ablative with *damnum* to denote the general action of ‘damage and interest’ to recover *damnum iniuria datum* [loss caused by wrongfulness] and on its own as a singular noun denoting the wrongdoing repaired by *actio iniuriarum*. While the *actio iniuriarum* is not now often referred to directly in Scots case law, it retains its importance as an organising category today, governing the recoverability of reparation for contumelious wrongdoing which does not result in any quantifiable ‘loss’ (hence, it is relevant in cases which are ‘not really about physical injury... [but] more about affront and degradation: see *CG v Glasgow City Council* 2011 SC 1 at 30). Where a defender intentionally or recklessly engages in conduct which is *contra bonos mores*

⁶ Robert Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death: Part III, English Accretions* [1975] CILSA 318, at 321.

⁷ Matthew Dyson and John Randall, ‘England’s Splendid Isolation’ in Matthew Dyson (ed.), *Comparing Tort and Crime: Learning from Across and Within Legal Systems*, (Cambridge University Press, 2015), at 19.

⁸ John Blackie, ‘The Interaction of Crime and Delict in Scotland’ in Matthew Dyson (ed.), *Unravelling Tort and Crime*, (Cambridge University Press, 2014), at 358-359.

⁹ See G. Campbell H. Paton, ‘Evaluation of the Institutions’ in David M. Walker, *Stair Tercentenary Studies*, (the Stair Society, 1981), at 201.

¹⁰ D. Neil MacCormick, *Legal Reasoning and Legal Theory*, (Clarendon Press, 1978), at 61.

¹¹ Blackie, n.8, at 358.

¹² That is to say, generally the facts that constitute the common law crimes applying the rules and principles of criminal law also can support a claim in delict: See Brian Pillans, *Delict: Law and Policy*, (W. Green, 2014), at para.8.26.

[contrary to ‘good morals’, or less archaically ‘public policy’] leading to the affront of the pursuer, *solatium* is payable by the defender to the pursuer notwithstanding the fact that the *iniuria* may occur *sine damno*. Accordingly, ‘rape’ in Scots civil law, is not a nominate delict, or ‘delicticle’, but is rather properly described as a ‘pure *actio iniuriarum*’ since the factual circumstances that give rise to an instance of rape necessarily (and manifestly) affront the dignity of the victim and the conduct of the defender must necessarily be contumelious (*i.e.*, must necessarily show a hubristic disregard of the ‘personality interests’ of the pursuer).¹³ In this interpretation, the wrong can be likened to assault *sine damno* (see *Stedman v Henderson* (1923) 40 Sh. Ct. Rep. 8) or unlawful deprivation of liberty,¹⁴ amongst other things.

In addition to developing the general action allowing for compensation in any instance of *damnum iniuria datum*, Scots law, then, has also long historically recognised delictual claims predicated on the Civilian *actio iniuriarum*, as well as delictual claims for restitution, interdict and ‘violent profits’ where a delinquent wrongfully interferes with the property right(s) of another (with or without causing ‘damage’). The actionability of the last of these is apparent from the fact that a neighbourhood ‘nuisance’ may be interdicted even if they have inflicted no ‘damage’ upon their victim’s property. If ‘damages’ are sought in addition to another remedy, *culpa*, or ‘fault’, on the part of the wrongdoer must be established, in line with the general requirements of recovery for *damnum iniuria datum* (see *Kennedy v Glenbelle Ltd* 1996 SC 95 at 100-101, *per* Lord President Hope). Likewise, in respect of moveable property, it has long been the case that one who wrongfully interferes with another’s possession of a moveable thing will be liable to return it and perhaps restore the ‘violent profits’ – that is, a monetary sum ‘calculated according to the profits that the dispossessed party could have made from the property during the period of dispossession’¹⁵ – to the dispossessed, regardless of the question of ‘ownership’. Conceptually, both the *solatium* which is payable in respect of *iniuria* and the ‘violent profits’ payable in respect of unlawful dispossession can (and should) be distinguished from ‘damages’, which itself ought not to be treated as a taxonomical governing category in Scots law.¹⁶

With that said, however, because in large part ‘the protection in the Scots law of delict of a person’s interest in his or her bodily integrity and physical freedom from the early modern period on has been in different ways separated from the protection of other specific interests relating to the person... the Scots common law of delict is not today structured clearly under two broad heads, Aquilian liability and *iniuria* (adapted and modified by human and rights law and statute law)’.¹⁷ The operative word here is ‘clearly’;¹⁸ though the fact of this bifurcation has been obscured by the tendency to view the prime division in the law of delict as being

¹³ Alasdair Maclean, ‘Autonomy, Consent and the Body in Delict’ in Joe Thomson (ed.), *Delict*, (W. Green, 2007), at para.11.79; David M. Walker, *The Law of Delict in Scotland*, (W. Green, 1981), at 498.

¹⁴ Jonathan Brown, *Detention of Private Persons by Private Persons as a Delictual Wrong: Liability for Deprivation of Liberty in Scots Private Law*, [2020] 1 St. Andrews Law Journal 41

¹⁵ Craig Anderson, *Spuilzie Today*, [2008] SLT (News) 257, at 259

¹⁶ Jonathan Brown, *Obtaining the “Main Keys to Wisdom”: Distinguishing “Damages” from other Pecuniary Remedies in Scots Law*, (forthcoming, 2023) Edinburgh Law Review.

¹⁷ John Blackie, ‘The Protection of *Corpus* in Modern and Early Modern Scots Law’ in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013), at 155.

¹⁸ See the discussion in Jonathan Brown, ‘Still a Part of Me’: ‘Functional Unity’ and the Human Body in Scots Law, [2022] Jur. Rev. 80, at 85.

between ‘intentional’ and ‘unintentional’ delicts,¹⁹ as Walker observed in his 1981 textbook on *Delict*, ‘liability in cases of delict, with few exceptions, is referable to the concepts of *iniuria* of *damnum iniuria datum*’.²⁰ In the years since 1981, the number of ‘exceptions’ may have grown as the law has come to receive or develop ever more nominate ‘delicticles’ which lack anything other than internal coherence, but Walker’s general point still stands: the law of delict allows (or ought logically to allow) for remedy in instances of ‘loss’ (comprising damage to property along with so-called ‘personal injury’, psychiatric injury and economic loss) caused by a delinquent’s wrongful conduct (subject to the establishment of *culpa* [fault] on the part of the defender and the general principles of ‘remoteness of damages’) as well as in cases in which a pursuer’s ‘personality interests’ are affronted by another’s contumelious wrongdoing (see, e.g., the ‘Scottish *post-mortem* cases’, *Pollok v Workman* (1900) 2 F. 354; *Conway v Dalziel* (1901) 3 F. 918 and *Hughes v Robertson* 1913 S.C. 394, as well as *Stevens v Yorkhill NHS Trust* 2006 SLT 889).

There is and has long been some controversy over whether or not wrongful interference with another’s proprietary right(s) ought to be properly categorised as a matter of ‘property law’ alone, or viewed as falling within the ambit of the law of delict. Issues arising from occupier’s liability and nuisance are treated, by Gordon and Wortley in *Scottish Land Law*, as the ‘two main categories of delictual liability [in land ownership] based upon fault’²¹ and the authors do not appear to consider wrongs such as ejection or intrusion as *ex facie* delictual, but more properly as possessory remedies.²² Spuilzie, for its part, is likewise treated as a ‘remedy protecting possession’, rather than a delict, by Carey Miller and Irvine in their comparable work on *Corporeal Moveables in Scots Law*, with ‘restitution’ generalised as ‘the right to recover things owned on the basis of assertion of title’.²³ This controversy has arisen in large part – it is submitted – because of the perceived ‘unbridgeable divide’ between ‘real rights’ (those which concern persons’ relationships with ‘things’ – i.e., legal objects – and are regarded as within the province of property law)²⁴ and ‘personal rights’ (those which concern persons’ – i.e., legal subjects’²⁵ – relationships with one another and are thought to fall within the domain of the law of obligations).²⁶ If, as is commonly thought, these concepts are juristic oil and water, then it seems to follow that there must be a logical and complete separation of matters into those which are in the cognisance of property and those which are within the realm of delict. Indeed, that there is such a distinction is said to be ‘obvious’ by Carey Miller and Irvine. Yet, as those authors go on to note, there is, in fact, clearly an ‘interface’ between matters pertaining to property and those which fall strictly under the heading of the law of ‘obligations’;²⁷ far

¹⁹ This is not, as discussed by Brown, a useful division for the law of delict to operate under: *ibid.*, fn.44.

²⁰ Walker, n.13, at 31.

²¹ William M. Gordon and Elspeth C. Reid, ‘Nuisance and Other Delicts’ in William M. Gordon and Scott Wortley, *Scottish Land Law Volume 2*, (3rd Edn.) (W. Green, 2020), para.28.02.

²² William M. Gordon and Scott Wortley, *Scottish Land Law Volume 1*, (3rd Edn.) (W. Green, 2011), para.14.23.

²³ David Carey Miller and David Irvine, *Corporeal Moveables in Scots Law*, (W. Green, 2005), at 10.24

²⁴ See Hector L. MacQueen, *MacQueen and Thomson on Contract Law in Scotland*, (Bloomsbury, 2020), para.1.6. Hence Scots property law has been described as ‘the law of things and rights in things’: Kenneth G. C. Reid, *The Law of Property in Scotland*, (Butterworth, 1996), para.1.02.

²⁵ See D. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford University Press, 2007), at 83.

²⁶ MacQueen, n.24, para.1.7.

²⁷ Carey Miller and Irvine, n.23, at 10.01

from being neatly separated, it appears that there is in fact considerable overlap between the law of property and of obligations insofar as remedies for wrongful interference are concerned.

The reasons for this so-called ‘interface’ between two ostensibly distinct taxonomical categories of law are in fact plain. With its foundationally Roman systems of ‘property’ and ‘obligations’, from a strict taxonomical point of view these topic-headings are not in fact rigidly separated, distinct, *phyla* in the Scottish legal system, but rather are each taxonomic classes under the *phylum* of ‘thing-law’. As MacCormick notes, ‘even in the twenty-first century, one can still say rather as Gaius said twenty centuries ago, that all law concerns persons, things and actions’.²⁸ It is thought that a greater degree of common cause is to be found between taxonomical classes than as between *phyla*, hence some degree of overlap is not merely a curiosity to be tolerated, but a necessary feature of the system to be expected. Indeed, as Stair notes, though the division between real and personal actions (the precursor to the conceptions of personal and real ‘rights’) is recognised by the law of Scotland, the terms are not here used ‘as these terms are taken in the Roman law, for that division, as is before expressed, is stretched to all actions; but with us, real actions are only such, wherein the ground of lands, or the profit of teinds are craved to be poinded’. Accordingly, unlike in Roman law, which was ‘so precise that none could vindicate but he who proved his right of property’, in Scots law there is instead a ‘real obligation upon possessors, not having title to defend their possession, to restore or redeliver, not only to the proprietor, but to the lawful possessor’ (Stair, *Institutions*, IV, 3, 45), with the language of ‘real obligation’ itself indicating the fact of overlap between ‘real rights’ and ‘personal rights’ in this area.

A word must be said at this juncture about the language of ‘taxonomy’. Traditionally in this ‘science of categorisation’, subjects of study are ranked according to a hierarchy which descends from the ‘domain’, to ‘kingdoms’, to ‘*phyla*’ (‘persons’, things’ and ‘actions’) on to particular ‘classes’, then on to ‘orders’, ‘families’, ‘genera’ and ultimately ‘species’. In the case of the study of the Scots law of delict, the ‘domain’ is ‘Law’ itself, the ‘kingdom’ is ‘private law’, the ‘*phyla*’ is ‘thing-law’, the class is ‘obligations’, the order is ‘*ex lege* obligations’, with the subject ‘delict’ itself being located as a taxonomic ‘family’ within the hierarchical order. The general action for reparation predicated on *damnum iniuria datum*, as well as that predicated on *actio iniuriarum*, can clearly be located as ‘genera’ within the order, with particular named instances of wrongdoing, such as ‘rape’, ‘assault’ and actions for ‘personal injury’ being located as ‘species’ within each particular genus. Those actions which are concerned with redressing wrongful interference with property, too, can be located as a *genus* of delict, with particular wrongs such as spuilzie and nuisance identified as particular species of this organising category.

Though there may be functional overlap with the law of property here, such does not detract from the fact that it is appropriate to identify one of the functions of the law of delict – as the taxonomic family concerned with affording redress for wrongdoing in general – as remedying wrongs involving property. Such categorisation finds support in the Institutional works of Bankton, who noted that while ‘undoubtedly [any] action must follow the nature of the right whereon it is founded’... ‘an action for the delivery of moveables is either a personal action or a real, as it is founded on the defender’s obligation, or on the pursuer’s right of property’. Hence, he concludes that ‘all actions that are directed against the Thing, and [which]

²⁸ D. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, (Oxford University Press, 2007), at 77.

have no personal conclusion upon the defender, may be justly esteemed real... [while] all actions wherein the defender is to be decreed to pay, perform, or deliver anything [being] personal; because thereby the Person of the delinquent is affected in the first place, and his Estate only consequentially' (Bankton, *Institute*, IV, 14, 1, 2).

Actions brought against particular, named, defenders for wrongful interference (of whatever nature) with one's property are, then, properly speaking delictual, though the basis of the action itself may colloquially be thought to rest in the pursuer's enjoyment of a 'real right' (e.g., the right of possession, which is a 'distinct lesser right than [ownership] (Stair, *Institutions*, II, 1, 8), or of ownership (the 'sovereign or primary real right' *per* Erskine, *Institutes*, II, 1, 1)). Likewise, as Carey Miller and Irvine recognise, an action for the return of property which is retained by another without *iusta causa* [just cause] may be based on the obligation arising from unjustified enrichment, although colloquially the claim to the thing retained may be said to rest on the original owner's 'real right' of *dominium* to the thing. As those authors recognise, 'the law needs no more than a basis upon which to order that the claimant is entitled to the thing; thereafter, assuming that the possessor does not allow the claimant to recover, the issue is one of enforcement'.²⁹

Accordingly, though from one point of view it makes sense to think of the right to reclaim property which one owns is based on one's right of ownership, and so predicated on a 'real right', as indicated by Bankton, the basis of the right to claim is rather the defender's (alleged) inability to justify their own possession of the thing, hence making the claim 'personal' (and so predicated on obligation), rather than 'real'. This, it is submitted, correlates with the fact that 'vindication proper' – that is, the *actio rei vindicatio*, 'in the Civilian sense of a property-derived action' (for the return of property) is 'expressly excluded by Stair', who preferred the formulation of 'restitution' – a wider 'remedy encompassing what amounts to a right of vindication'.³⁰ While, then, it makes a certain degree of sense to treat the protection of ownership, possession and general enjoyment of one's property rights as falling within the ambit of property law properly so-called, since the interests which the law protects here are quintessentially 'real', in a more precise sense the protection of such which the law affords in the face of wrongdoing must be thought delictual, whether or not any 'loss' arises as a result of the wrongful interference. 'Restitution', as a concept which imposes a 'real obligation', demonstrates that 'property law' and the law of 'obligations' are not so far separated as some might be led to believe by the language of 'unbridgeable divide[s]', but is ultimately one which can itself be most properly located as a descriptive term within the class of obligations, albeit that its primary purpose is to protect rights of property.

The Scots law of delict, then, can be said to be structured in such a way as to allow generally for claims of reparation for instances of *damnum iniuria datum* (i.e., Aquilian claims), *iniuria* (i.e., claims predicated on *actio iniuriarum*) and for wrongful interference with property. The factors tying together these three broad headings are twofold; firstly, all are concerned primarily with wrongdoing (liability arises *ex delicto*: that is, from a wrongful act) and secondly all give rise to an 'obligation', in the classical sense of a 'legal tie' (see Erskine, *Institute*, III, 1, 2), rendering the delinquent liable as debtor to perform some action for, or make payment to, the pursuer, who stands as creditor. Naturally, although the three broad

²⁹ Carey Miller and Irvine, n.23, at 10.02.

³⁰ *Ibid.*, at 10.02.

headings can be clearly identified as separate and distinguished for pedagogical purposes, there may be overlap between them in the sense that one particular instance of wrongdoing might generate liability under multiple headings simultaneously. For instance, one who causes patrimonial loss to their neighbour by acting as a culpable nuisance will be liable both for wrongful interference with his neighbour's enjoyment of their property and for *damnum iniuria datum*, while (given that 'damage done' to the human body generates a recognised form of *damnum*, which was not the case in the Roman law from which the action was borrowed)³¹ one who contumeliously assaults another will be liable both for damages on the basis of the Aquilian action and *solatium* on the basis of the *actio iniuriarum*.

While, then, it has been said that 'there is no doubt now... that the essential basis for liability and reparation for nuisance is *culpa*' (*Kennedy v Glenbelle* 1996 SC 95, at 98 per Lord President Hope), such is required only to support a claim of *damages* for nuisance. Properly speaking, a claim of *damages* for 'nuisance' may be identified as a predicated on the general action to recover *damnum iniuria datum*, while a claim of 'nuisance' which includes no crave of *damages*, but rather some other remedy such as interdict, can clearly be located under a separate head of liability, since the question is not as to whether or not the defender was at fault, but rather whether the pursuer was 'exposed to what was *plus quam tolerabile* when due weight has been given to all surrounding circumstances of the offensive conduct and its effects' (*Watt v Jamieson* 1954 SC 56, at 57 per Lord President Cooper; *R.H.M Bakeries v Strathclyde RC* 1985 SC (HL) 17, at 44, per Lord Fraser of Tullybelton). What might thus appear to be a single action – that of 'nuisance' – is in fact two distinct claims: one for the wrongful interference with the pursuer's enjoyment of their property, the other for *damages* due to the damnification caused to the property (or potentially the pursuer's health) by said wrongful interference. The redress which can be afforded for wrongful interference is conceptually distinct from the remedy of *damages* payable to repair a patrimonial loss. That this has not been made clear by either the courts or the academic literature concerning nuisance is regrettable. As Norrie observed in respect of the law of defamation, 'the coalescence of what logically are two separate causes of action into one [may] not surprisingly but with disastrous effects on the coherence of the law, [lead] to the coalescence of the very basis of liability itself'.³²

Norrie's adapted word of warning is just as – if not more – pertinent in respect of wrongs such as 'assault'. It has long been recognised that 'where an *iniuria* causes both injured feelings and patrimonial loss... *damages* for both elements can be recovered in a single action, if loss under both heads be relevantly averred'.³³ Yet although simultaneous recovery for *iniuria* and *damnum iniuria* is clearly possible, even in the academic literature concerning such the language used by commentators has been loose and has unhelpfully equated 'damages' for *damnum iniuria* with the *solatium* that can be afforded for *iniuria sine damno*. Indeed, Walker appears to suggest that a relevant head of 'loss' must be shown to succeed in a claim of *iniuria*, when in fact a core feature of any claim of *iniuria* is that 'proof of physical injury or loss is not

³¹ See John Blackie, *Unity in Diversity: the History of Personality Rights in Scots Law*, in Niall Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), at 85.

³² Kenneth McK. Norrie, 'The Scots Law of Defamation: is there a Need for Reform?' in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), at 438-439.

³³ Walker, n.13, at 32.

required' for success.³⁴ As Whitty noted in an article of 2005, 'one of the main keys to wisdom [in understanding Scots delict] is to distinguish between three [*ex facie* comparable] remedies',³⁵ namely damages (for patrimonial loss), *solatium* (for pain and suffering, better termed assythment) and *solatium* for wounded feelings under an *actio iniuriarum*. To compound these distinct remedies together under the singular head of 'damages' is to invite disaster for any who wish to accurately conceptualise the law. Accordingly, then, Walker's statement can and should be revised so as to read '[W]here an *iniuria* causes both injured feelings and patrimonial loss... [monetary redress] for both elements can be recovered in a single action, if [the particulars of each claim] under both heads be relevantly averred' and the courts, practitioners and scholars should be more prepared to identify the distinction between the various remedies which may be craved in the course of a single court action.

Thus, although it is true to say – as Lord Hope did – that there is no such thing as an 'exhaustive' list of named delicts in Scotland, that is not to say that particular forms of wrongdoing are not given specific descriptive names, but rather that generally speaking a nominate term (i.e., a term such as 'rape', or 'spuilzie', or 'personal injury') can be located as a particular *species* of one of the higher level *genera* discussed above. Indeed, such is the nature of the general actions for reparation of loss, injury and property interference, that each has the potential to incorporate – and so render nugatory – nominate 'delicticles' that do not otherwise fit within this general schema: such, McKenzie and Evans-Jones suggest, in fact occurred in respect of the nominate wrong of assythment.³⁶ Yet – as the experience of the delict of defamation, discussed further below, shows³⁷ – the process can also go the other way, with a simple descriptive term obtaining a life of its own and so ossifying into a separate nominate 'delicticle' with little left in common with the wider *genera* out of which it evolved.

'Delicticles' may retain their character as such from customary law (as, e.g., in the case of assythment, prior to its legislative abrogation), develop – as discussed in the previous article in this series³⁸ – by way of the evolution of Scots common law (as in the case of, e.g., the delict of 'breach of confidence', or of the 'economic delicts') or be introduced by way of statute (as in the case of 'defamation' under the Defamation and Malicious Publications (Scotland) Act 2021). Once introduced into the law, by whatever means, and possessed of their own bespoke character, these delicticles cease (if they ever were) to be part of the general 'intellectual superstructure' of the law of delict and become, instead, freestanding (and formulaic) nominate wrongs akin to the fragmented 'torticles' of the Common law world. Hence, 'while, from the early years of the Nineteenth century, individual cases [of defamation] began to appear that could have been rationalised under a wider concept of *iniuria*, by then the law had moved towards *de facto* strict liability'. Accordingly, by the middle of the century, though capable of being conceptually linked to a wider concept of *iniuria* (a link which was not in fact properly

³⁴ Douglas Brodie (ed.), *Stewart on Reparation: Liability for Delict*, (W. Green, 2021), para.A5-003

³⁵ Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194, at 200-201

³⁶ Donna W. McKenzie and Robin Evans-Jones, 'The Development of Remedies for Personal Injury and Death' in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, (The Stair Society, 1995), at 295.

³⁷ See further John Blackie, 'Defamation' in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations, passim* and Norrie, n.32.

³⁸ Jonathan Brown, *The Mouse and the Snail: Reappraising the Significance of Donoghue v Stevenson Part I – A Case Worth Celebrating?*, at 6.

drawn until the close of the Twentieth century), the law of defamation had in effect become its own freestanding subject under the general heading of ‘delict’, with bespoke requirements of liability which did correspond to those of the hitherto observable *genera*.

For the sake of attempting to retain some degree of overall structure, then, the nominate ‘delicticles’ of Scots law can be collated into a miscellaneous *genus* which may itself take the title of ‘delicticles’. As such, the ‘intellectual superstructure’ of the Scots law of delict can be mapped as including, at the level of *genera*, liability for *damnum iniuria*, liability for *iniuria*, liability for wrongful interference with property and the commission of sundry ‘delicticles’ which do not fit under any of the three broad categories. The structure (or, rather, lack of structure) of the miscellaneous category may correlate with the general arrangement (or, again, lack thereof) of the Anglo-American law of torts, but it is readily apparent that the wider framework of the Scots law of delict is fundamentally distinct. Yet, because this framework itself allows for the develop of bespoke ‘delicticles’ from the broad categories of general action, there exists the potential for the overall constitution of the law of delict to break down if too much emphasis is placed on particular nominate cases at the expense of claims predicated on wider principles. This, it is thought, is where the danger of ‘incrementalism’ becomes most apparent.

While it presently remains the case that Scots law does not recognise a ‘tort’, or for that matter a ‘delicticle’, of ‘negligence’,³⁹ it is thought that this will continue to be the case cannot be taken as an immutable article of faith. It is distinctly possible that if Scots lawyers prove too ready to accept, as determinative in their own cases, judgments from Common law courts (including the UK Supreme Court in its capacity of deciding English, Welsh and Northern Irish appeals), the law of delict will come to develop a particular nominate delicticle of ‘negligence’ conceptually severed from the Aquilian action under which reparation for negligent wrongdoing has hitherto been afforded. This would be regrettable from both a conceptual and pedagogical standpoint, but more pertinently it would be (or ought to be regarded) as undesirable by anyone who holds the view that ‘the categories of negligence are [and ought] never [to be] closed’ (*Donoghue v Stevenson* 1932 SC (HL) 31, at 70 (*per* Lord MacMillan)). It is consequently incumbent upon Scots lawyers and scholars – particularly those who ‘revel’ in the judgment of *Donoghue* – to be aware of the underlying structure of the Scots law of delict, and to be wary of uncritically accepting the authority of judgments which have their provenance in the law of torts rather than in the law of delict.

This article, then, has attempted to provide a conceptual ‘map’ of the ‘intellectual superstructure’ of the Scots law of delict, so as to assist lawyers and jurists in conceptualising the core points of difference between the Scottish system and the organisation of the Common law. Fundamentally, the idea of ‘delict’ as a taxonomical family can be tied together with reference to the concepts of ‘obligation’ (the governing taxonomical class under which ‘delict’ can be located) and ‘wrongfulness’. Yet, although the idea of ‘wrongfulness’ is central to the law of delict, as Fagan noted in 2005, Scots textbooks on delict may well omit mention of the concept of ‘wrongfulness’ altogether, or otherwise equate the concept with

³⁹ See Anton Fagan, ‘Negligence’ in Reinhard Zimmermann, Kenneth Reid, and Daniel Visser, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (Oxford University Press, 2005), at 498.

‘negligence *per se*’.⁴⁰ This is an unsatisfactory state of affairs; to ensure and retain systemic coherence, Scots lawyers and scholars of delict should bear in mind that every delictual case is concerned, at its core, with the twofold question of whether or not the defender committed a wrong and whether or not the defender can be blamed (and so held legally liable) for the commission of that wrong. Accordingly, the next article in this series will interrogate the twin concepts of ‘wrongfulness’ and ‘blameworthiness’, before moving to identify the fact that where (though only where) liability under *damnum iniuria* is concerned, the law is principally concerned with an anterior concept: that of ‘loss’.

⁴⁰ *Ibid.*, at 505.